

## UNITED STATES DISTRICT COURT

Northern District of California

Oakland Division

KORVEL M. SUTTON,

No. C 11-03911 LB

Plaintiff,

**ORDER GRANTING MOVANTS'  
MOTIONS TO INTERVENE**

v.

APPLE COMPUTERS ITUNES *et al.*,

[ECF Nos. 59, 63, 64]

Defendants.  
\_\_\_\_\_**I. INTRODUCTION**

Two non-parties, Roderick Williams and Rams Horn BV (“Rams Horn”), have filed motions to intervene in this action. Having considered the papers submitted and the lack of opposition by any current party, the court hereby **GRANTS** both motions.

**II. BACKGROUND**

On August 8, 2009, *pro se* plaintiff Korvel Sutton sued Apple Inc.<sup>1</sup> (“Apple”) and individuals Donald McMillan and James Callon (collectively, “Defendants”) for copyright infringement. Complaint, ECF No. 1.<sup>2</sup> Mr. Sutton, a former member of the early-1990s West Coast rap group, “Pretty Boy Gangsters,” alleges that Defendants infringed his copyrighted songs that appear on

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<sup>1</sup> Erroneously sued as “Apple Computers iTunes.”

<sup>2</sup> Citations are to the Electronic Case File (“ECF”) with pin cites to the electronic page number at the top of the document, not the pages at the bottom.

1 Pretty Boy Gangsters' 1991 album, *Rollin' Like A Star*. Complaint, ECF No. 1 at 3-4, Exh. 2-C.<sup>3</sup>  
 2 Mr. Sutton alleges that the album's songs have been made available for download on Apple's iTunes  
 3 service without his consent or permission, in violation of Title 17 of the United States Code. *Id.* at  
 4 3-4, Exh. 2-A.

5 The court granted Mr. Sutton's application to proceed *in forma pauperis* and ordered the U.S.  
 6 Marshal to serve Defendants with the complaint and summonses. IFP Order, ECF No. 6. All three  
 7 Defendants were successfully served by the U.S. Marshal. Acknowledgment of Service (Apple),  
 8 ECF No. 8; Acknowledgment of Service (Callon), ECF No. 10; Acknowledgment of Service  
 9 (McMillan), ECF No. 19. Mr. Callon promptly answered the complaint. Answer (Callon), ECF No.  
 10 9. After some delay, Apple answered the complaint on November 21, 2011, and Mr. McMillan filed  
 11 an answer on February 22, 2012. Answer (Apple), ECF No. 39; Answer (McMillan), ECF No. 73.

12 Pursuant to the court's standard procedure, Mr. Sutton, Mr. Callon and Apple attended the initial  
 13 case management conference on February 9, 2012. Minute Entry, ECF No. 58. During the course  
 14 of that conference, Mr. Callon, Mr. Sutton and Apple voiced concern that two other potential parties  
 15 – namely, Roderick Williams, who, along with Mr. Sutton, co-founded the Pretty Boy Gangsters and  
 16 is named on the copyright attached to the initial complaint (Complaint, ECF No. 1 at 11, Exh. 2-C),  
 17 and Rams Horn, a Dutch entity that alleges it entered into an agreement with Mr. McMillan<sup>4</sup>  
 18 transferring to it “all rights in the audio master recordings and the musical compositions embodied in  
 19 such masters” of the songs at issue here (Amended Counter- and Cross-Claims, ECF No. 66 at 2, ¶¶  
 20 2, 10, Exh. 2) – may need to be added to this case. The parties agreed to meet and confer in order to  
 21 determine the optimal procedure for adding all necessary parties, and to file the required motions  
 22 accordingly.

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24 <sup>3</sup> The following songs appear on *Rollin' Like A Star*: (1) “Pretty Boy Gangsters”; (2) “Hard  
 25 as Fuck”; (3) “Activist”; (4) “Monies on My Mind”; (5) “Mack on Top of the Stack”; (6) “P.B.G.'s  
 26 Get Funky (Rollin' like a Star)”; (7) “K the Buster”; (8) “On the Tip of a Mack”; (9) “Indo Smoke”;  
 and (10) “It Ain't Right.” Complaint, ECF No. 1 at 7-8, Exhs. 1-A & 1-B.

27 <sup>4</sup> Rams Horn alleges that its predecessor in interest, Rams Horn Productions BV, entered into  
 28 a contract with Macola Records Group, Inc., of which Mr. McMillan was then president and owner.  
 Amended Counterclaim, ECF No. 66 at 2, ¶¶ 2, 5.

Subsequently, Mr. Williams filed a motion to intervene as a plaintiff in the action on February 9, 2012. Motion (Williams), ECF No. 59.<sup>5</sup> Rams Horn filed an answer to the complaint and a motion to intervene as a defendant on February 13, 2012. Motion (Rams Horn), ECF No. 61; Answer, ECF No. 62. Rams Horn has also filed counter- and cross-claims against all plaintiffs. Amended Counter- and Cross-Claims, ECF No. 66. Apple has filed statements of non-opposition to the intervention of both Mr. Williams and Rams Horn. Statement of Non-Opposition (re: Williams), ECF No. 68; Statement of Non-Opposition (re: Rams Horn), ECF No. 70. To date, no parties have voiced any objections.

### III. LEGAL STANDARD

Under Rule 24(a)(2), a non-party has the right to intervene in any action if it can “claim an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interests, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). In *Wilderness Society v. United States Forest Service*, the Ninth Circuit provided a four-part test for analyzing motions to intervene under Rule 24(a)(2): (1) The motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impeded its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action. 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

In determining whether the requirements of Rule 24(a)(2) have been met, the Ninth Circuit directs district courts to follow “practical and equitable considerations” and to construe the Rule “broadly in favor of proposed intervenors.” *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (internal quotation marks omitted); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). Accordingly, this Circuit has rejected any requirement that the intervening party have a “specific legal or equitable interest” in the action in which they seek to

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<sup>5</sup> Mr. Williams also filed a motion for joinder. Motion for Joinder, ECF No. 63. Because the court grants his motion for intervention, his motion for joinder is DENIED as moot.

1 intervene. *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *United States v. City of*  
 2 *Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002). Instead, the “interest” prong is “‘primarily a  
 3 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is  
 4 compatible with efficiency and due process.’” *County of Fresno*, 622 F.2d at 428 (quoting *Nuesse v.*  
 5 *Camp*, 385 F.2d 698, 700 (D.C. Cir. 1967)). Most importantly here, “a prospective intervenor ‘has a  
 6 sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a  
 7 result of the pending litigation.’” *Wilderness Soc’y*, 630 F.3d at 1179 (quoting *California ex rel.*  
 8 *Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

#### 9 IV. DISCUSSION

##### 10 A. Timeliness

11 Three factors are considered when a court considers the timeliness of an application for  
 12 intervention under Rule 24(a)(2): “1) the stage of the proceeding at which an applicant seeks to  
 13 intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay.” *California*  
 14 *Dept. of Toxic Substances Control et al. v. Commercial Realty Projects et al.*, 309 F.3d 1113, 1119  
 15 (9th Cir. 2002). “Timeliness is a flexible concept; its determination is left to the district court’s  
 16 discretion.” *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (citing *Dilks v. Aloha*  
 17 *Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981)).

18 Mr. Williams filed his application for intervention on February 9, 2011, the same day as the  
 19 initial case management conference where Mr. Williams’s absence was first brought to the court’s  
 20 attention. Motion, ECF No. 59. Due to the lack of prejudice (and the failure of any party to suggest  
 21 as much) and the relatively early stage of the litigation, the court finds that Mr. Williams’s motion is  
 22 timely.

23 Rams Horn filed its motion on February 14, 2012, five days after the initial case management  
 24 conference. Motion, ECF No. 64. Based on the above-listed factors, and for similar reasons as  
 25 described with respect to Mr. Williams, the court finds that Rams Horn’s intervention is timely as  
 26 well.

##### 27 B. Interest in the Subject Action

28 “To demonstrate a significant protectable interest, an applicant must establish that the interest is

1 protectable under some law and that there is a relationship between the legally protected interest and  
 2 the claims at issue.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897  
 3 (9th Cir. 2011) (internal citations omitted).

4 Along with Mr. Sutton, Mr. Williams is a co-founder of the Pretty Boy Gangsters and is named  
 5 on the copyright attached to the initial complaint. *See* Complaint, ECF No. 1 at 11, Exh. 2-C.  
 6 Because the copyrights to the recordings made by the now-defunct rap group are at issue here, Mr.  
 7 Williams clearly has a significant protectable interest in the subject matter of this litigation.

8 Rams Horn claims that Mr. McMillan transferred to it the copyrights to the songs at issue in this  
 9 case. Amended Counter- and Cross-Claims, ECF No. 66, Exh. 2. Because Rams Horn claims rights  
 10 over these songs, the court finds it has a significant protectable interest in the litigation.

#### 11 C. Impairment of Ability to Protect Interest

12 “If an absentee would be substantially affected in a practical sense by the determination made in  
 13 an action, he should, as a general rule, be entitled to intervene . . . .” *Id.* at 898 (citing Fed. R. Civ.  
 14 P. 24 advisory committee’s note).

15 As noted above, Mr. Williams claims to have an ownership interest in the songs. A finding by  
 16 this court that Mr. Williams does not, in fact, have such an interest would substantially affect his  
 17 claimed ownership rights. Therefore, Mr. Williams satisfies the “impairment” prong.

18 Similarly, a finding that Rams Horn never validly purchased the rights to the songs, as it believes  
 19 it did, would substantially affect their interests. Because of this potential consequence, Rams Horn  
 20 has also established that they may be substantially affected by this litigation.

#### 21 D. Adequacy of Representation

22 In determining whether the existing parties adequately represent the interests of the purported  
 23 intervenor, the Ninth Circuit considers three criteria: (1) Whether the interest of a present party is  
 24 such that it will undoubtedly make all the intervenor’s arguments; (2) whether the present party is  
 25 capable and willing to make such arguments; and (3) whether the intervenor would offer any  
 26 necessary elements to the proceeding that other parties would neglect. *People of State of California*  
 27 *v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (internal citations omitted).

28 Mr. Williams claims partial ownership of rights in the Pretty Boy Gangsters material at issue in

1 this case. Because Mr. Williams has no representative in the action, because it is not argued that a  
 2 current party will make all of his arguments for him and because his presence is necessary for a  
 3 complete resolution of this litigation, Mr. Williams has a right to intervene.

4 Rams Horn intends to defend the agreement that it believed grants it the copyrights to the  
 5 property at issue here. Because it is unclear what positions the other parties will take in this action,  
 6 and because Rams Horn's property interests could be adversely affected, Rams Horn should be  
 7 allowed to intervene.

### 8 V. CONCLUSION

9 Mr. Williams and Rams Horn have demonstrated that they satisfy all of the requirements for  
 10 intervention by right under Rule 24(a)(2). For the foregoing reasons, the court **GRANTS** Mr.  
 11 Williams's and Rams Horn's motions to intervene.

12 With respect to case management, it is the court's understanding that Mr. Sutton recently  
 13 attempted to file a First Amended Complaint that would add Mr. Williams as a plaintiff.<sup>6</sup> Now that  
 14 the court has granted Mr. Williams's motion to intervene, Mr. Sutton and Mr. Williams may file a  
 15 First Amended Complaint no later than March 23, 2012. Should a First Amended Complaint be  
 16 filed, Defendants shall answer or otherwise respond to the First Amended Complaint in accordance  
 17 with Federal Rule of Civil Procedure 12. If a First Amended Complaint is not filed, the parties are  
 18 ordered to meet and confer to determine the best procedure for going forward with, and responding  
 19 to, the pleadings already on file.<sup>7</sup>

20 This disposes of ECF Nos. 59, 63, 64.

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 25 <sup>6</sup> The Clerk of the Court suggested that Mr. Sutton wait until the court ruled on the motions  
 26 to intervene before filing a First Amended Complaint.

27 <sup>7</sup> The court notes that Rams Horn filed an answer to Mr. Sutton's original complaint and also  
 28 filed counter- and cross-claims against the parties. Should a First Amended Complaint not be filed  
 by March 23, 2012, Rams Horn's answer and its counter- and cross-claims shall be deemed filed on  
 that date, and the parties shall proceed in accordance with Federal Rule of Civil Procedure 12.

**IT IS SO ORDERED.**

Dated: March 2, 2012

  
LAUREL BEELER  
United States Magistrate Judge

**UNITED STATES DISTRICT COURT**  
**For the Northern District of California**